RAJOO SELVAPPAN & ORS

v.

ABDUL BHARI KADER IBRAHIM & ORS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: 22-33-1998]
9 SEPTEMBER 2005

CIVIL PROCEDURE: *Parties - Joinder of parties - Application for leave to add intended defendants - Whether application came within ambit of O. 15 r. 6(2)(b)(i) and (ii) of the Rules of the High Court 1980*

CIVIL PROCEDURE: *Pleadings - Plea of limitation - Whether must be specifically pleaded - Procedural steps to be taken - Whether issue of limitation to be determined after an analysis of respective pleadings and viva voce evidence of all parties at full trial*

This was an application in encl. 79 filed by the plaintiffs for leave to add intended defendants 8, 9, 10 and 11 respectively ('the intended defendants') in the action herein. The intended defendants 8, 9 and 10 were said to be the partners in a firm of solicitors ('the firm') who at the material time were allegedly representing the plaintiffs in the sale and purchase of a piece of land. They were alleged to have wrongly surrendered the plaintiffs' issue document of title to intended defendant 11 thereby causing damage and loss to the plaintiffs. The intended defendants contended that the plaintiffs' application was totally misconceived and untenable in law as the plaintiffs' allegation of breach of trust against them was barred by s. 22 and 29 of the Limitation Act 1953.

Held (allowing the application):

[1] This application comes within the ambit of either O. 15 r. 6(2)(b)(i) of the Rules of the High Court 1980 in that all matters in dispute *viz* the alleged breach of trust and fraud can be effectively and completely determined and adjudicated upon; or O. 15 r. 6(2)(b)(ii) in that as between the plaintiff and all the intended defendants, there exists a question or issue of alleged breach of trust and fraud and it would be just and convenient to determine between them. (p 332 a-b)

[2] Order 18 r. 8(1)(a) of the Rules of the High Court 1980 expressly provides that a party must in any pleading subsequent to a statement of claim plead specifically, for example, the relevant statute of limitation which he alleges makes any claim of the party not maintainable. Hence, the intended defendants' reliance on ss. 22 and 29 of the Limitation Act 1953 must be specifically pleaded, which necessarily presupposes that the plaintiffs' statement of claim must contain the essential averments pertaining to the role or participation of the intended defendants in relation to the alleged breach of trust or fraud. These are the procedural steps that the respective parties must first embark upon. Thereafter the issue of limitation is to be determined after an analysis of the respective pleadings, and *viva voce* evidence of all the parties including the intended defendants at the full trial. That being the case, it was impossible for the respective learned counsel to state conclusively that ss. 9, 22 and 29 of the Limitation Act 1953 would be applicable or inapplicable. The court expressed no view on their applicability in this interlocutory application. Thus, the intended defendants' objection was unsustainable. (pp 334 h & 335 a-c)

Case(s) referred to:

Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Datuk Bandar Kuching Utara v. Kuching Plaza Sdn Bhd & Ors [2001] 2 MLJ 10 ***(refd)***

Goh Keng How v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 HC ***(refd)***

Government of Malaysia v. Mohamed Amin Hassan [1986] 1 MLJ 224 ***(refd)***

Ideal Film Ltd v. Richards [1927] 1 KB 374 ***(refd)***

Kuala Lumpur Finance Bhd lwn. Azmi & Co Sdn Bhd Dan Satu Lagi [1996] 4 MLJ 650 ***(refd)***

Lim Yoke Kong v. Sivapiran Sabapathy [1992] 4 CLJ 2219; [1992] 1 CLJ (Rep) 184 SC ***(refd)***

Malite Sdn Bhd v. Abdul Karim Gendut & Ors [1981] 2 MLJ 29 ***(refd)***

Montgomerry v. Foy [1895] 2 QBD 321 ***(refd)***

Nite Beauty Industries Sdn Bhd & Anor v. Bayer (M) Sdn Bhd [2000] 6 CLJ 151 HC ***(refd)***

Owners of the Ship or Vessel 'Kusu Island' v. Owners of Cargo Lately Laden on Board the Ship or Vessel 'Brani Island' [1989] 3 MLJ 257 ***(refd)***

Shell Malaysia Trading Sdn Bhd v. Leong Yuet Yeng & Ors [1990] 3 MLJ 254 ***(refd)***

Tai Choi Yu v. Syarikat Tingan Lumber Sdn Bhd [1998] 4 CLJ 293 CA ***(refd)***

Van Gelder v. Sowerby Bridge Society [1890] 44 Ch D 374 ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 6(1)(a), 9, 22(1)(a), (b), (2), 29(a), (b)
Rules of the High Court 1980, O. 15 r. 6(2)(b)(i), (ii), O. 18 r. 8(1)(a)

Other source(s) referred to:
Malaysian High Court Practice 2002, Desk Edition MLJ, p 367, paras 15.6.1, 15.6.2

For the plaintiffs - Patrick Dass; M/s Patrick Dass & Co
For Messrs Nordin & Phua (the firm) - Mogan Karupiah; M/s Mogan Karupiah
For En Subramaniam (intended defendant) - Bala Gopal; M/s Bala Gopal & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application

This is an application in encl. (79) filed by the plaintiffs for leave to add Datuk Wira A Nordin bin Mohd Amin, Datuk Phua Jin Hock, Mr. Yap Koon Roy and Mr. Subramaniam a/l Vengadasalam as intended defendants 8, 9, 10 and 11 respectively ("the intended defendants") in the action herein, with costs in the cause.

Factual Background

This has been set out in the affidavit in support affirmed by plaintiff 1 who is also authorised by all the other plaintiffs to affirm the affidavit for them, being the co-owners of the land in question.

Datuk Wira A Nordin bin Mohd Amin, Datuk Phua Jin Hock and Mr. Yap Koon Roy ("intended defendants 8, 9 and 10") were said to be the partners in the then firm of solicitors Messrs Nordin and Phua ("the firm" or interchangeably intended defendants 8, 9 and 10) who at the material time were allegedly representing the plaintiffs in the sale and purchase of the land which became the central issue in the action herein. They were alleged to have wrongfully surrendered the plaintiffs' issue document of title Grant No. 2958 Lot 579 in the mukim of Ayer Panas, district of Jasin, Melaka ("the issue document of title") to intended defendant 11, thereby causing damage and loss to the plaintiffs.

It was alleged by the plaintiffs that as the firm was holding the issue document of title on trust for the plaintiffs, the wrongful surrender thereof by the firm to intended defendant 11 allegedly constituted a breach of trust.

The plaintiffs alleged that intended defendant 11 together with defendants 1 to 5 have taken the issue document of title from the firm wrongfully, fraudulently and without the plaintiffs' consent, thereby committing fraud.

The land had allegedly been wrongfully transferred to one Astana Strategy (M) Sdn Bhd ("Astana") which had in turn charged the land to Southern Finance Bhd as security for a loan to Astana.

This action was filed on 27 March 1998.

Mr. Yap Koon Roy, intended defendant 10, affirmed an affidavit in reply, stating, *inter alia*, that the plaintiffs' application is "totally misconceived and untenable in law, devoid of any merits and hopelessly unsustainable" as the plaintiffs' allegation of breach of trust against the intended defendants "is barred by the provisions of the Limitation Act 1953", since the cause of action based on breach of trust against the firm accrued in 1996.

Intended defendant 11 in his affidavit in reply raised, *inter alia*, the plea of limitation also.

Intended Defendants' Locus Standi

Mr Patrick Dass learned counsel for the plaintiffs raised the issue of the intended defendants' *locus standi* to oppose the plaintiffs' application at this stage as the amended writ and statement of claim have not been served upon them.

For the firm, learned counsel Mr. Mogan Karupiah and, for intended defendant 11, Mr. Bala Gopal submitted that this is a non-issue.

In my judgment, it needs to be observed that this application was originally raised by way of an oral application in the course of the trial of the action herein during which evidence has been adduced in relation to the role of the intended defendants. In order to regularise the application and in the interest of justice, I have directed that the application be made formally by way of summons in chambers with an affidavit in support, to be served on all the intended defendants as the application should be heard *inter partes*, as opposed to *ex partes*. Therefore, the short answer to the submission for the plaintiffs is that *locus standi* is not an issue at all, as the intended defendants' right to be heard must be made a reality.

Order 15 r. 6(2)(b)(i) Or (ii)

The foundation of the plaintiffs' application is premised on O. 15 r. 6(2)(b)(i) or (ii) of the Rules of the High Court 1980.

All references to an order and a rule are references to that order and rule in the Rules of the High Court 1980 unless the context otherwise requires.

The plaintiffs cited the following cases:

1. *Kuala Lumpur Finance Bhd lwn. Azmi & Co Sdn Bhd dan Satu Lagi* [1996] 4 MLJ 650;
2. *Shell Malaysia Trading Sdn Bhd v. Leong Yuet Yeng & Ors* [1990] 3 MLJ 254;
3. *Datuk Bandar Kuching Utara v. Kuching Plaza Sdn Bhd & Ors* [2001] 2 MLJ 10; and
4. *Malite Sdn. Bhd. v. Abdul Karim bin Gendut & Ors.* [1981] 2 MLJ 29.

The essence of the submission for the firm and for intended defendant 11 is that the discretion of the court must be exercised according to settled principles.

In my judgment, it is essential to reproduce O. 15 r. 6(2)(b)(i) and (ii) as follows:

> Misjoinder and non-joinder of parties. (O. 15 r. 6)
>
> 6. (1) …
>
> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> (a) …
>
> (b) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
>
> ...

At this juncture, it is useful to state the relevant principles that have been enunciated by our courts in this regard, as follows:

1. Order 15 r. 6(2) confers upon the court a wide discretion to make an order thereunder so that all matters in dispute can be effectively and completely determined and adjudicated upon: *Kuala Lumpur Finance, supra;* and *Malaysian High Court Practice 2002* Desk Edition MLJ p 367 para 15.6.1.

2. An application under O. 15 r. 6(2) may be made at any stage of the proceedings but before final judgment: *Shell Malaysia Trading supra; Tai Choi Yu v. Syarikat Tingan Lumber Sdn Bhd* [1998] 4 CLJ 293 CA; *Nite Beauty Industries Sdn Bhd & Anor v. Bayer (M) Sdn Bhd* [2000] 6 CLJ 151; and *Malaysian High Court Practice, supra,* p 367 para 15.6.2.

3. There is no requirement to obtain the consent of the party intended to be added as a defendant before adding him: *Datuk Bandar Kuching, supra;* and *Malaysian High Court Practice, supra,* p 370-390 para 15.6.9.

4. Often the court will make such changes as may be necessary to enable all matters in dispute to be effectually and completely determined and adjudicated upon: *Van Gelder v. Sowerby Bridge Society* [1890] 44 Ch. D. 374; *Montgomerry v. Foy* [1895] 2 QBD 321; *Ideal Film Ltd v. Richards* [1927] 1 KB 374; *Malite Sdn Bhd, supra;* and *Malaysian High Court Practice, supra,* p 367 para 15.6.3.

By way of illustration, in *Malite Sdn Bhd, supra,* the appellant sued the respondents in respect of a piece of land originally owned by the third respondent. It was alleged that the first respondent acting as the agent of the appellants had accepted an offer of sale from the third respondent. Subsequently, the third respondent caused the land to be transferred to the second respondent. The defence of the respondents was that the land was offered to a company which was not the same as the appellants. Four days before the trial, the appellants applied to add another company as co-plaintiff and to amend certain parts of the statement of claim. The trial judge refused the application. On appeal, Salleh Abas FJ (later LP) delivered the judgment of the Federal Court and held that this was a proper case in which the court should exercise its discretion under O. 15 r. 6(2), mindful of the principle that all parties ought to be brought before the court so that all their rights and liabilities may be determined in one action instead of in several.

Reverting to the facts before me, I am of the view that this application comes within the ambit of either O. 15 r. 6(2)(b)(i) in that all matters in dispute *viz* the alleged breach of trust and fraud can be effectively and completely determined and adjudicated upon; or O. 15 r. 6(2)(b)(ii) in that as between the plaintiff and all the intended defendants, there exists a question or issue of alleged breach of trust and fraud and it would be just and convenient to determine between them.

Limitation Act 1953

It was elaborated for intended defendants 8, 9 and 10 that the plaintiffs' application is an afterthought of the plaintiffs' solicitors and is barred by s. 22(2) of the Limitation Act 1953 in that the plaintiffs' cause of action for alleged breach of trust which accrued in 1996 had expired six years later, in the year 2002, relying on *Goh Keng How v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353 HC; and *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC.

A reference hereinafter to a section is a reference to that section in the Limitation Act 1953 unless the context otherwise requires.

Intended defendant 11 also urged the court to consider the issue of limitation in the light of ss. 22 and 29, *Owners of the Ship or Vessel 'Kusu Island' v. Owners of Cargo Lately Laden on Board the Ship or Vessel 'Brani Island'* [1989] 3 MLJ 257 CA Singapore; *Lim Yoke Kong v. Sivapiran a/l Sabapathy* [1992] 4 CLJ 2219; a[1992] 1 CLJ (Rep) 184 and *Government of Malaysia v. Mohamed Amin bin Hassan* [1986] 1 MLJ 224.

It was contended for the plaintiffs that as against all the intended defendants, the limitation period has not expired as the plaintiffs had just discovered the alleged wrongfulness and breach of trust on the part of the firm, and fraud on the part of intended defendant 11, when Mr. Yap Koon Roy, intended defendant 10, gave evidence herein on 16 January 2003.

On the basis of the above submissions, it is necessary for me to address the issue of limitation in the light of the Limitation Act 1953. This Act contains a variety of limitation periods governing a multitude of causes of action set out in detail thereunder.

For this purpose, I shall refer to ss. 9, 22 (1)(a) and (b) and (2), and 29(a) and (b) which where relevant read:

9. Limitation of actions to recover land

(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, …

22. Limitation of actions in respect of trust property.

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action:

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

(2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:

[Proviso: (not relevant))

29. Postponement of limitation period in case of fraud …

Where, in the case of any action for which a period of limitation is prescribed by this Act, either:

(a) the action is based upon the fraud of the defendant …; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) …,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud …

In this interlocutory application, I am of the view that I should only consider the general legal effect of these sections.

It is pertinent to observe that the matter herein concerns land including the recovery of land which may in all probabilities attract the application of s. 9(a) which provides for a limitation period of 12 years from the date the cause of action accrued.

Upon a true construction of s. 22(1)(a) and (b), read with (2), I am of the view that s. 22(1) is the predominant provision which prescribes no period of limitation in an action by a beneficiary coming within the circumstances stated in (a) or (b) therein.

On the other hand, s. 22(2) is a subservient provision as it has been made subject to s. 22(1). In other words, in the event of a conflict or inconsistency between the two subsections, s. 22(2) must in effect give way to s. 22(1).

Section 29(a) or (b) effectively postpones the limitation period when the cause of action is based on the fraud of the defendant and time only begins to run when the plaintiff has discovered the fraud: see *Lim Yoke Kong, supra.*

Next, in considering the authorities cited for all the intended defendants, it is necessary for me to focus on judicial pronouncements in relation to ss. 9, 22(1)(a) and (b) and (2), and 29(a) and (b). Hence, authorities touching on the effect of other provisions of the Limitation Act 1953 would not be useful.

In *Goh Keng Huat, supra,* Abdul Malik Ishak J had the occasion to consider s. 22(2), but the predominant provisions of s. 22(1) had not been brought to the attention of the learned judge.

In *Owners of the Ship or Vessel 'Kusu Island', supra,* cited for intended defendant 11, the relevant issue for determination by the Singapore Court of Appeal was whether the amendment to the writ should be disallowed and struck out and the service thereof set aside. Nothing turned on the interpretation of ss. 9, 22 and 29.

In *Government of Malaysia, supra,* the majority judgment of the Supreme Court delivered by Lee Hun Hoe CJ (Borneo) (as he then was) was in relation to s. 8, but did not concern the consideration of ss. 9, 22 and 29.

Similarly in *Credit Corporation (M) Bhd, supra,* the judgment of Hashim Yeop A Sani CJ (Malaya), (as he then was), delivered for the then Supreme Court, was only concerned with s. 6(1)(a) and s. 29(c).

As none of the preceding three judgments turned on the issue of limitation under ss. 9, 22 and 29(a) and (b), I am of the view that they are unsupportive of the contention presented for all the intended defendants.

In my judgment, for the purposes of this application, a reference to the procedural law regulating the special plea of limitation would be illuminating. O. 18 r. 8(1)(a) expressly provides that a party must in any pleading subsequent to a statement of claim plead specifically, for example, the relevant statute of limitation which he alleges makes any claim of the party not maintainable.

Hence, the intended defendants' reliance on ss. 22 and 29 must be specifically pleaded, which necessarily presupposes that the plaintiffs' statement of claim must contain the essential averments pertaining to the role or participation of the intended defendants in relation to the alleged breach of trust or fraud. These are the procedural steps that the respective parties must first embark upon.

Thereafter, the issue of limitation is to be determined after an analysis of the respective pleadings, and *viva voce* evidence of all the parties including the intended defendants at the full trial. That being the case, it is quite impossible for the respective learned counsel to state conclusively that ss. 9, 22 and 29 would be applicable or inapplicable. In this regard, I express no view on their applicability in this interlocutory application, but would give a definitive decision thereon in due course at the full trial.

In the circumstances, I hold that the intended defendants' objection is unsustainable.

Conclusion

On the foregoing grounds, I exercise my discretion in favour of the plaintiffs herein and hold that the intended defendants should be added as defendants. I therefore allow the plaintiffs' application and make an order in terms as stated at the outset of this judgment.

I also make the following consequential orders:

1. Plaintiffs to serve the amended writ and amended statement of claim on all the intended defendants on or before 23 September 2005;
2. The intended defendants to serve their respective defence and counterclaim, if any, on or before 7 October 2005;
3. Plaintiffs to serve the reply to defence and counterclaim, if any, on or before 21 October 2005; and
4. Case management is hereby fixed for hearing on 28 October 2005.